

DOUBLE JEOPARDY — Application after mistrial is granted by court for "manifest necessity" — Revised 11/2009

When a mistrial has been granted by the trial court on its own motion because of "manifest necessity," double jeopardy does not bar a retrial. As the Court of Appeals explained in *State v. Givens*, 161 Ariz. 278, 279, 778 P.2d 643, 644 (App. 1989):

In those cases where the trial court declares a mistrial *sua sponte*, whether the Double Jeopardy Clause permits retrial without defendant's consent "depends on whether there is a manifest necessity for the mistrial or whether the ends of public justice will otherwise be defeated." *McLaughlin v. Fahringer*, 150 Ariz. 274, 277, 723 P.2d 92, 95 (1986); *see also Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); *United States v. Perez*, 22 U.S. (9 Wheat) 579, 6 L.Ed. 165 (1824). A mistrial declared because of manifest necessity does not bar a new trial. *Arizona v. Washington, supra*, 434 U.S. at 505, 98 S.Ct. at 830. In fact, where for reasons deemed compelling by the trial judge the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment. *Gori v. United States*, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961); *Illinois v. Somerville*, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973).

"‘Manifest necessity’ can arise in many different situations and the courts have not attempted to adopt a single, all encompassing definition. *State v. Aguilar*, 217 Ariz. 235, 239, 172 P.3d 423, 427 (App. 2007). *But see McLaughlin v. Fahringer*, 150 Ariz. at 277, 723 P.2d at 95 (listing various types of manifest necessity). For there to be “manifest necessity” warranting retrial, the United States Supreme Court requires a showing that there is a “high degree” of necessity before concluding that a retrial is appropriate. *Arizona v. Washington, supra*, at 506. In *Gusler v. Wilkinson*, 199 Ariz. 391, 394-95, 18 P.3d 702, 705-06 (2001), the Arizona Supreme Court explained the rationale behind this extreme requirement, “Because of the importance of a defendant’s [right to have a particular jury decide his fate], the state must demonstrate manifest

necessity for any mistrial declared over the objection of the defendant, and the burden is a heavy one . . . Indeed, the very term ‘manifest necessity’ emphasizes the magnitude of the prosecutor’s burden.” (internal citation omitted)

Generally, the Arizona Court of Appeals will not disturb a trial court’s ruling on manifest necessity absent an abuse of discretion. *Givens* at 279. However, the United States Supreme Court recognizes that the degree of deference a reviewing court should give the trial court’s decision, when evaluating an abuse of discretion, will change according to the circumstances. *See Arizona v. Washington, supra*, at 506-507. For example, “strictest scrutiny” of the trial court’s decision is needed when a court *sua sponte* declares a mistrial because critical evidence for the prosecution is unavailable. *Id.* at 507-508. Thus, absent an abuse of discretion, an appellate court should find that the Double Jeopardy Clause permits retrial after the court *sua sponte* declares a mistrial based on a finding of manifest necessity and without the defendant’s consent.